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IN THE

Supreme Court of the United States

JOSEPH ARPAIO, MARICOPA COUNTY SHERIFF, IN HIS OFFICIAL CAPACITY; MARICOPA COUNTY,

Petitioners,

—v.—

JANE DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Arizona Court of Appeals properly held that Maricopa County's unwritten policy prohibiting the transportation of inmates for the purpose of obtaining non-therapeutic abortions violated the Fourteenth Amendment?

RULE 29.6 DISCLOSURES

None of the Respondents in this action has a parent corporation or any stock owned by publicly held corporations.

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STATEMENT OF THE CASE

This case involves a challenge to Petitioners' unwritten policy that bans inmates from obtaining abortions by refusing to transport them to an abortion provider, unless the abortion is necessary to save the inmate's life or health (hereinafter "the Policy"). Before the lower court enjoined this practice, the only way an inmate could obtain an abortion was to find a lawyer and convince a court to order Petitioners (hereinafter collectively "the County") to transport her for the procedure. The County developed this Policy in 1990 in direct response to an inmate's request for an abortion.[1] The County did so despite its ongoing practice of frequently transporting prisoners off-site without a court order for medical and non-medical reasons, including to visit dying relatives and attend funerals. Pet. App. 14a.

Both courts below, the Arizona Superior Court and the Arizona Court of Appeals, held the Policy unconstitutional under the Fourteenth Amendment, and both rejected the County's claim that the Policy serves legitimate interests in maintaining security, conserving prison resources, and avoiding liability. First, these courts found that transport outside the

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[1] The County developed the Policy because it was concerned about "adverse publicity," "political problems," and "media ramifications to an elected official" that it feared could stem from transporting an inmate in need of abortion care. (R 29 Ex. 9 at 17:18-21:6; *see also* R 29 Ex. 7 at 39:3-11.) The Policy applies on its face to all "elective" medical care, but Ms. Doe challenged it and the lower courts enjoined it only insofar as it is applies to requests for transportation for abortion. Pet. App. 23a & n.11.

Policy violated the Fourteenth Amendment under either the test enunciated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for evaluating abortion restrictions outside the prison context, or the test in *Turner v. Safley*, 482 U.S. 78 (1987), for evaluating prison regulations alleged to impinge on inmates' constitutional rights.[7] Pet. App. 29a-30a. In applying *Turner*, the trial court concluded that "when the decision to require a court order depends on the nature of the treatment or reason for the transport, and, not the security risk imposed by the individual inmate, there is no legitimate penological purpose." Pet. App. 30a. The court explained:

> How then can there be a reasonable legitimate penological interest in the security of inmates if one category of inmates must obtain a court order and inmates in the other categories are not similarly restricted? How, also, can there be a reasonable interest in security if Defendants never oppose a request for a court order for transport and offer the court no guidelines to inform its decisions?

Id.

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being addressed on their merits." Pet. App. 28a (citing *Roe v. Wade*, 410 U.S. 113, 125 (1973)).

[7] Ms. Doe challenged the Policy under the Fourteenth Amendment, the Eighth Amendment, and the Arizona Constitution, but the lower courts only reached her Fourteenth Amendment claim.

In affirming, the Arizona Court of Appeals first held that the Policy should be tested solely under *Turner*, not *Casey*. Like the trial court, it then rejected the County's effort to justify its Policy on security grounds:

> The County did not object to transporting Doe on security grounds and apparently has never raised a security objection to transporting any inmate seeking an abortion. Given that the County, not the court, has expertise in security, we fail to see how requiring a court order furthers any legitimate security interests.

Pet. App. 15a. The court similarly determined that the Policy was unrelated to the County's other proffered interests, such as reducing liability and conserving resources, and also held that the other aspects of the *Turner* test weighed in favor of Ms. Doe. *See infra* at 9-14. Ultimately, the court held that the Policy was not "reasonably related to the County's professed neutral objectives" and concluded that "the Policy represent[ed] an 'exaggerated response' to the County's proffered penological concerns." Pet. App. 23a (quoting *Turner*, 482 U.S. at 90-91). The Arizona Supreme Court declined to review the case. Pet. App. 2a.

REASONS FOR DENYING THE WRIT

The Court should decline to review this case for two reasons. First, the Arizona Court of Appeals correctly held the Policy unconstitutional under the Fourteenth Amendment. The court held that the

Policy failed the test most deferential to the County – the *Turner* test – and in doing so, properly applied this Court's jurisprudence to the facts of this case. If the Policy were reviewed under *Casey*'s undue burden test, it would – *a fortiori* – fail that less deferential test as well. In asking this Court to resolve whether *Casey* provides a threshold standard that must be satisfied before *Turner* is applied, the County is seeking a purely advisory opinion since the answer to that question will have no bearing on the outcome of this case.

Second, review is not warranted because there is no split among the courts about the proper legal standard to use to assess policies that block inmates' access to abortion. Although the County claims that there are considerable differences between *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), and *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004), these courts plainly applied the same legal standard, and simply reached different outcomes based on the different facts in each case.[8] Such fact-bound inquiries do not meet this Court's standards for granting review. Accordingly, the petition for certiorari should be denied.

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[8] Since the County filed its petition, the Eighth Circuit decided *Roe v. Crawford*. In that case, the court – applying the same legal standard – held that Missouri's policy of prohibiting transportation for inmates' abortions violated the Fourteenth Amendment. – F.3d – , 2008 WL 187513 (8th Cir. Jan. 22, 2008), *petition for rehearing filed*, No. 06-3108 (Feb. 5, 2008).

I. The Arizona Court of Appeals Correctly Held the Policy Unconstitutional Under the Fourteenth Amendment.

The court below properly determined that the Policy violated the Fourteenth Amendment. The court held that the Policy should be evaluated solely under the *Turner* test,[9] and it applied *Turner* in a manner consistent with this Court's precedents. Contrary to the County's claim, the court afforded the proper level of deference to the County's judgment. Indeed, the court specifically recognized its duty to defer to the professional judgment of the prison administrators, relying on this Court's decision in *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Pet. App. 12a-13a. At the same time, the court recognized the irony of the County's insistence on such deference in this case, given that the County has – *via* the Policy – abdicated its professional judgment and shifted its responsibility to the courts:

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[9] The County incorrectly contends that Ms. Doe must first satisfy the *Casey* test, and then satisfy the *Turner* test in order to prevail. *See, e.g.*, Pet. Br. at 5. The Arizona Court of Appeals correctly rejected this approach. Pet. App. 9a n.5. Indeed, this Court has never held that an inmate bringing a constitutional challenge to a prison policy must satisfy two separate tests – the test that applies outside the prison context, in addition to the *Turner* test – in order to obtain relief. Rather, in those cases in which the Court determined that *Turner* applies, it has evaluated the challenged prison practice solely under the *Turner* test. *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); *Turner*, 482 U.S. at 81. Even if correct, moreover, the County's two-step analysis would not alter the outcome of this case and thus does not warrant plenary review; inasmuch as the Policy fails even the most deferential test, the *Turner* test, it must, *ipso facto*, fail the stricter *Casey* test. *See also infra* at 14-15.

> [I]n this case the County has effectively declined to exercise its professional judgment. The County has simply left to the courts the security and resource issues it asserts should control the decision whether it is necessary to transport an inmate.

Pet. App. 13a. *See also* Pet. App. 22a ("The County claims expertise on security and resource issues. It should exercise that expertise.").

In analyzing the first *Turner* prong, whether the Policy bears a rational connection to legitimate penological interests, the Arizona Court of Appeals noted that the County's interest in security and safety was legitimate. *See* Pet. App. 13a (citing *Overton*, 539 U.S. at 133). After examining the record, however, including the fact that the County transports inmates offsite approximately once a week for a variety of nonmedical reasons without a judicial order, in addition to multiple medical transports each week, R 29 Ex. 8 at 31:14-16, 35:15-17, the court found that there was "no evidence in the record that an increased risk of a security breach exists when the County transports an inmate for a non-therapeutic abortion compared to transportation for any other reason." Pet. App. 14a. Moreover, the court recognized:

> [T]he County acknowledged that transporting inmates for abortion services is no more secure if done pursuant to court order . . . rather than voluntarily. . . . The County did not object to transporting Doe on security grounds and apparently has

> never raised a security objection to transporting any inmate seeking an abortion. Given that the County, not the court, has expertise in security, we fail to see how requiring a court order furthers any legitimate security interests.

Pet. App. 14a-15a. Accordingly, following *Turner*, the court held that the Policy could not be sustained because "'the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.'" Pet. App. 14a (quoting *Turner*, 482 U.S. at 89-90).

The court similarly found that the County's other proffered interests – conserving prison resources, avoiding liability, and complying with Arizona's ban on the use of state funds for abortion – bore no relationship to the Policy. As to the interest in conserving prison resources, the court rejected the County's argument as unsound:

> [I]t is not clear that the Policy, as applied to transportation for abortion services, reduces . . . costs. As the County must comply with a court order directing it to transport an inmate for abortion services, . . . the Policy does not allow the County to wholly avoid the costs associated with transports for abortion services.

Pet. App. 16a-17a.

The court also held that the County's interest in avoiding liability was not related to the Policy. The County suggested that, somehow, a court order

could insulate it from liability to third parties who objected to the inmate's abortion; liability to the inmate for any health complications related to the abortion; and liability to a third party for harm caused by an escaped inmate. The Arizona Court of Appeals properly found these arguments unpersuasive, reasoning that there is no cause of action for assisting an adult woman obtain a legal abortion; it is inexplicable how the County could be liable for complications arising from a procedure performed by a third party medical practitioner selected and compensated by the inmate; and Arizona law insulates public employees for the acts of escaping or escaped inmates, absent intentional conduct or gross negligence. Pet. App. 17a-18a.

The court similarly found no connection between the Policy and the County's interest in complying with the state law that prohibits the use of state funds for abortions: an inmate pays for the abortion herself, and bears the cost of security and transport for the abortion.[10] The court went on to

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[10] The statute prohibits public funds from being used for "the performance of any abortion unless an abortion is necessary to save the life of the woman having the abortion." Ariz. Rev. Stat. § 35-196.02, *held unconstitutional in part on other grounds*, *Simat Corp. v. Ariz. Health Care*, 203 Ariz. 454, 56 P.3d 28 (2002). The Arizona courts in this case have determined that the state law does not in fact prohibit prison officials from voluntarily transporting inmates for abortions. That state court determination of a state law question is binding on this Court. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (state courts are the "ultimate expositors of state law"); *Cox v. New Hampshire*, 312 U.S. 569, 573-78 (1941). In addition, other major prison systems in Arizona, such as the Arizona State and Pima County prison systems, voluntarily transport inmates for non-therapeutic abortions, *see* Pet. App. 22a n.10, further demonstrating that the abortion funding ban

note the inherent inconsistencies in the County's position:

> [I]f the County's concern were valid, it would be a violation of the statute even if a court ordered the transportation. The record shows, however, that the County has never opposed an inmate's request for a court order requiring it to transport the inmate for abortion services on the basis that the public funds statute prohibits the transportation of inmates for abortion services.

Pet. App. 19a. The Arizona Court of Appeals, following this Court's precedents, therefore found that the Policy did not bear a reasonable relationship to any legitimate penological interest.[11]

In considering the second *Turner* factor, whether inmates have an alternative means to exercise their rights, the Arizona Court of Appeals again followed this Court's jurisprudence in recognizing that to sustain the Policy it need only determine that there is such an alternative, even if it is not ideal. Pet. App. 19a (citing *Overton*, 539 U.S. at 135). The evidence demonstrated, however, that

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does not prohibit prisons from transporting inmates for this purpose.

[11] The County inexplicably argues that once the lower courts "found a rational connection between the Policy and the interests offered to justify it, its inquiry should have ended." Pet. Br. at 20. The lower courts, however, *never* found a rational connection between the Policy and any of the County's asserted interests.

there was no alternative means for inmates to obtain an abortion. In so holding, the court rejected the County's argument that the purported availability of a court order was an alternative avenue.[12] First, the court recognized that requiring an adult inmate to petition a court could not be compared to the judicial bypass procedure that is available as an alternative to minors who must comply with parental consent or notice laws. The court held that "[r]egulations affecting minors implicate different concerns, and may justifiably be broader, than those applicable to adult women." Pet. App. 20a (citing *Casey*, 505 U.S. at 895, 898, and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976)). Second, the court correctly held that under the Policy, a court may, as the sentencing commissioner initially did here, "prevent an inmate from obtaining an abortion by delaying or denying her request, thereby functioning as a gate-keeper with the ability to overrule her choice to have an abortion."[13] Pet. App. 20a-21a. Indeed, Petitioner Sheriff Arpaio testified that he has "no idea" whether a court will grant an inmate's request for an abortion and conceded that "[t]he gal may have the baby by the time it gets through the

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[12] This argument is also in tension with the County's claim that the Policy serves such interests as security, safety, and conservation of resources – the Policy can only further those interests if the inmate is *never* transported for the abortion. It is accordingly disingenuous for the County to simultaneously claim that the inmate has an alternative means to exercise her right *via* the courts.

[13] The court also looked to the deposition of Petitioner Sheriff Arpaio, in which he testified that the County will not transport an inmate for an abortion absent a court order because it "feels more comfortable" if a court has issued an order. Pet. App. 21a n.9.

court system." (R 29 Ex. 10 at 27:4-7, 33:7-22.) Ultimately, the court held that "an indiscriminate ban on all transportation for non-therapeutic abortions does not allow inmates sufficient alternative means to exercise their right to choose to have an abortion." Pet. App. 21a.

The Arizona Court of Appeals' analysis under the third *Turner* prong – the impact on prison resources if the right is accommodated – is also consistent with this Court's precedents. The court found that "the undisputed evidence demonstrates that accommodating inmates' abortion rights would have a de minimis financial impact on the County's jail facilities given that the inmate bears the expense." Pet. App. 21a. The court recognized that transportation for abortion services is a "negligible fraction" of the overall transports the County performs each year for court appearances, visits to dying relatives, or other medial treatment; indeed, the County has transported only 5 or 6 inmates for abortions since the Policy's inception in 1990. Pet. App. 21a-22a; *see also id.* at 16a. The court found "no evidence that the costs associated with [abortion] transportation are significantly higher than other transportation." Pet. App. 22a. Moreover, the costs associated with transporting an inmate pursuant to a court order are the same as the costs of transporting her voluntarily. *See* Pet. App. 16a-17a. Ms. Doe was willing to pay these costs. *See supra* at 3 n.4. Accordingly, the court's conclusion that accommodating the right to abortion would have a minor impact on prison resources comports with this Court's jurisprudence. *See Turner*, 482 U.S. at 90.

Finally, the Arizona Court of Appeals properly applied the fourth *Turner* prong: whether there is

evidence of an obvious, easy alternative. The court found that the County could easily "consider inmates' requests for transportation for abortion services at the administrative level, just as it considers requests for compassionate visits. Any security or resource issues may be raised and addressed administratively . . . ." Pet. App. 22a. This holding is consistent with *Turner*'s guidance: "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation" is not reasonable. 482 U.S. at 91.

Upon consideration of all the *Turner* factors, the Arizona Court of Appeals concluded that the Policy "represents an 'exaggerated response' to the County's proffered penological concerns," and it affirmed the trial court's decision holding the Policy unconstitutional under the Fourteenth Amendment as applied to abortion. Pet. App. 23a (quoting *Turner*, 482 U.S. at 90-91).

A fortiori, the Policy constitutes an undue burden under *Casey* because it imposes a unique and onerous judicial approval requirement for abortions, and because of the delays inherent in seeking such approval, which are illustrated in this case. This is not an issue of the permissibility of a brief delay, but of an absolute ban an inmate can circumvent only by obtaining a court order. Importantly, the Policy allows a court to veto an inmate's decision to obtain an abortion – as the sentencing commissioner did here – in direct conflict with this Court's precedents. *See, e.g., Danforth*, 428 U.S. at 69 (holding that a state cannot veto a woman's abortion decision or

delegate veto power to anyone).[14] This Court has also recognized the constitutional significance of forcing a woman to delay an abortion for an indefinite period – in this case seven weeks – which obviously can lead to the decision being made by "default." *See Bellotti v. Baird*, 443 U.S. 622, 642-43 (1979).[15]

In short, the court below reached the right result, and that result does not depend on whether the facts in this case are analyzed under *Turner*, *Casey*, or some combination of both tests. Accordingly, the decision to strike down the Policy

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[14] The court's veto power is exacerbated by the absence of standards guiding the consideration of inmates' motions. Although the existence of such standards would not render the Policy constitutional, the lack of standards highlights the court's absolute discretion to grant or deny the inmate's request on whatever grounds the judge chooses. *Cf., e.g., City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 439-41 (1983) (parental involvement ordinance unconstitutional because its judicial bypass was devoid of standards to guide judges), *overruled in part on other grounds by Casey*, 505 U.S. 833.

[15] The abortion funding cases relied upon by the County in claiming that the Policy does not create an undue burden, Pet. Br. at 6-9, are inapposite in any event. The County requires inmates to pay for transportation and security costs, as well as the abortion itself, and Ms. Doe did not challenge that requirement. *See supra* at 3 n.4. Moreover, the fact that the government can decline to facilitate non-therapeutic abortions outside the prison context does not mean that a prison can refuse to transport an inmate for this purpose where, as here, there is no penological reason for refusing to do so. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) ("when the State takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being").

under the Fourteenth Amendment was correct,[16] and does not merit plenary review by this Court.

II. The County Has Identified No Conflict Among the Courts of Appeals on the Applicable Legal Standard for Evaluating Prison Policies That Ban Abortion.

Although the County attempts to create the appearance of a split – between the Arizona Court of Appeals and the Third Circuit on the one hand, and the Fifth Circuit on the other – each of those courts, like *every* other court to consider prison policies restricting abortion, has applied the same legal standard: the *Turner* test. *Crawford*, 2008 WL 187513, at *2; *Victoria W.*, 369 F.3d at 484-85; *Monmouth*, 834 F.2d at 331-32; *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459, at *2 (S.D. Ohio Jan. 10, 2001); *Doe v. Barron*, 92 F. Supp. 2d 694, 696 (S.D. Ohio 1999) (following *Monmouth*'s application of *Turner*). Thus, contrary to the County's argument, the Fifth Circuit in *Victoria W.* did not take a "fundamentally different approach to . . . *Turner*," Pet. Br. at 13. Rather, it applied *Turner* to the particular facts before it, and reached a result different from the result here and in *Monmouth*, the Third Circuit case. Indeed, the *Victoria W.* court itself distinguished *Monmouth* as "rest[ing] on different facts." 369 F.3d at 487.

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[16] The County's attempt to conflate the Fourteenth and Eighth Amendment claims is unavailing. *See* Pet. Br. at 11. The courts below rested their decisions solely and independently on the Fourteenth Amendment.

Challenges to prison regulations under *Turner* are inherently fact-dependent because prison administration is not uniform from facility to facility. Hence, were this Court to review the decision below, it would almost certainly announce no new legal principle. Where, as here, lower courts have uniformly interpreted this Court's precedent as establishing the applicable legal standard, the fact that a lower court reaches a different result based on a particular evidentiary record does not warrant plenary review by this Court. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 859 (1982) (White, J., concurring) (noting that certiorari would have been unwarranted if sole issue had been whether established legal standard was properly applied to facts); *Gen. Council on Fin. and Admin. of the United Methodist Church v. Superior Court of Ca.*, 439 U.S. 1355, 1373-74 (1978) (Rehnquist, Circuit Justice) (denying stay, noting that a grant of certiorari would be unlikely because the question raised "depend[ed] on the particular facts of each case," and there was no indication that the lower court failed to invoke the proper, established legal standard); *cf. Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33-34 (1993) (per curiam) (refusing to review a fact-bound issue because no new standard of law would emerge).

It is also unsurprising that the court below reached the same result as the Third Circuit in *Monmouth*, and one different from the Fifth Circuit in *Victoria W.*, because the record below is analogous to the former, and different from the latter. *See* Pet. App. 16a, 17a, 18a, 22a. For example, the court below found – as did the *Monmouth* court – that conservation of costs could not justify the Policy

because "the County will expend resources fulfilling its responsibility to provide her proper pre-natal, delivery and post-natal medical care, a cost that may equal or exceed the cost associated with transportation for abortion services." Pet. App. 17a (citing *Monmouth*, 834 F.2d at 341). In contrast, while the court below relied heavily on the fact that the County routinely transports inmate offsite, without a court order, for nonmedical reasons such as to attend funerals, Pet. App. 14a, no similar evidence was presented in *Victoria W.* That these factual distinctions led to different outcomes is unremarkable.

Moreover, with the exception of the courts in *Victoria W.*, every other court to consider policies restricting or prohibiting inmates' access to abortion has held that such policies violate the Fourteenth Amendment. *Crawford*, 2008 WL 187513;[17] *Monmouth*, 834 F.2d 326; *Leis*, 2001 WL 1842459; *Barron*, 92 F. Supp. 2d 694. *Victoria W.* is therefore properly evaluated as an outlier, and is also premised on faulty legal reasoning.[18] The *Victoria*

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[17] In striking down Missouri's ban on abortions for inmates, the *Crawford* court noted, in dicta, that a court-order policy like the one in *Victoria W.* might be an alternative way to allow inmates access to abortion. 2008 WL 187513, at *6. This dicta is not binding; does not stand for the proposition that *all* court-order policies are reasonable under *Turner*; is not based on evidence before that court; and therefore creates no conflict among the circuits. *Cf. California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'" (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956))).

[18] While *Victoria W.* is an outlier, not even that decision embraces a position so radical as that of the County: that the right to abortion simply does not survive incarceration, *see, e.g.*, Pet. Br. at 5, 10, 12, and thus abortion may be banned for

W. court held that a court-order requirement would serve security interests by reducing the number of transports. But the only way such a policy could reduce the number of transports is if the requests for court orders were denied, and inmates were barred from obtaining abortions. That would constitute an absolute ban on abortions for inmates, which the *Victoria W.* court implicitly – and correctly – acknowledged would be unconstitutional. *See, e.g.*, 369 F.3d at 483-84. Under that court's own reasoning, therefore, the court-order requirement serves no purpose at all. But the fact that *Victoria W.* was wrongly decided does not warrant plenary review of this case, especially given that the court below reached the correct result.

The County has therefore not identified a split among the courts of appeals that warrants this Court's resolution. Accordingly, this Court should decline to review this case.

CONCLUSION

For the foregoing reasons, the County's petition for a writ of certiorari should be denied.

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inmates. *Every* court to consider prison policies restricting abortion has determined, either implicitly or explicitly, that the right to abortion survives incarceration. *Crawford*, 2008 WL 187513, at * n.2; *Victoria W.*, 369 F.3d at 483-84; *Monmouth*, 834 F.2d at 334 n.11; *Leis*, 2001 WL 1842459, at *3; *Barron*, 92 F. Supp. 2d at 696.

Respectfully submitted,

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